

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MICHAEL E. ANDERSON

Claimant

VS.

PRESTIGE, INC.

Respondent

AND

LIBERTY MUTUAL INSURANCE COMPANY

Insurance Carrier

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Docket No. 1,010,407

ORDER

Respondent appeals the November 30, 2004 Award of Administrative Law Judge Steven J. Howard. Claimant was awarded benefits for a 15.75 percent scheduled injury to his left forearm for an injury on February 10, 2003. Oral argument was presented to the Appeals Board (Board) on May 17, 2005.

APPEARANCES

Claimant appeared by his attorney, William L. Phalen of Pittsburg, Kansas. Respondent and its insurance carrier appeared by their attorney, John R. Emerson of Kansas City, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge (ALJ). Additionally, at oral argument, the parties stipulated that claimant's last day worked for respondent was February 10, 2003, with claimant being terminated as a result of this incident. Therefore, any "additional compensation" as defined by K.S.A. 2002 Supp. 44-511 should then be included in claimant's average weekly wage. The parties also agreed that the ALJ's utilization of 25 weeks instead of 26 weeks in determining claimant's average weekly wage is appropriate under these circumstances.

ISSUES

1. What is the nature and extent of claimant's injury? More particularly, has claimant suffered permanent injury to his left upper extremity at the hand/forearm level as a result of the incident on February 10, 2003?
2. What was claimant's average weekly wage on the date of accident? More particularly, are the entries contained in the wage statement¹ (showing claimant's wages paid for the 25 weeks preceding the accident and the one week including the accident under the category of vacation/bonus) monies paid for claimant's vacation, which would not be included under K.S.A. 2002 Supp. 44-511 as additional compensation, or monies paid as a bonus, which would be included in claimant's average weekly wage?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Board finds as follows:

Claimant suffered accidental injury to his left upper extremity on February 10, 2003, when a nail gun discharged, driving a small finishing nail into the palm of claimant's hand approximately one-half inch below where claimant's middle finger joins his hand. Respondent acknowledged that horseplay was not involved and the accident was compensable. Therefore, the issues were limited to the nature and extent of claimant's injury and the average weekly wage.

Claimant underwent treatment with board certified orthopedic surgeon Virendra C. Patel, M.D., of Independence, Kansas. Dr. Patel treated claimant on several occasions, ultimately releasing claimant on March 12, 2003, without restrictions and without assessing claimant any functional impairment. Dr. Patel tested claimant's range of motion, finding flexion and extension of the middle finger to be normal, which indicated active joint motion. Dr. Patel found claimant to have no range of motion limitations, no numbness or tingling and a zero percent impairment pursuant to the fourth edition of the *AMA Guides*.² Dr. Patel, however, acknowledged he did neither Tinel's nor Phalen's tests on claimant.

¹ R.H. Trans, Cl. Ex. 1 at 3.

² American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

Claimant was examined at his attorney's request by board certified orthopedic surgeon Edward J. Prostic, M.D., on April 22, 2003, six weeks after claimant was last examined by Dr. Patel. At that time, claimant described significant hand pain, with numbness up to his elbows. Claimant, at the regular hearing, was asked by his attorney how often he experienced the hand pain, throbbing and numbness, and claimant responded that he experienced hand pain "every other day."³ Claimant also described arm pain and the inability to hold objects, dropping them regularly. Dr. Prostic diagnosed claimant with flexor tenosynovitis, which he testified was caused by the injury to claimant's flexor tendon, and with carpal tunnel syndrome in claimant's left wrist. Dr. Prostic went on to testify that the residuals from the tenosynovitis contributed to claimant's carpal tunnel syndrome symptoms. He suggested claimant wear a wrist splint and be provided with anti-inflammatory medication. Dr. Prostic stated that claimant may want to consider an EMG and possibly surgery in the future. Dr. Prostic rated claimant at 16.5 percent to the hand pursuant to the fourth edition of the *AMA Guides*, which translates to a 15 percent impairment to the upper extremity at the level of the shoulder. However, Dr. Prostic acknowledged that claimant's symptoms were limited to claimant's wrist and did not go beyond the elbow. Dr. Prostic agreed that the *AMA Guides* do not rate at the forearm level, even though the Kansas Workers Compensation Act does.

Respondent argues that Dr. Prostic's opinion cannot be considered credible, as it is based to a significant degree on claimant's complaints to the doctor. Claimant is portrayed as being less than credible, as, at the time of the regular hearing, claimant provided a significantly different description of the accident than that provided by respondent's maintenance worker, Jerald Hare. Claimant testified to attempting to use the nail gun while building wooden boxes for dresser drawers or silverware drawers. Claimant stated the nail gun slipped off of the drawer he was working on, shooting the nail into his hand.

Mr. Hare, respondent's maintenance employee, however, testified to a substantially different accident. Mr. Hare had worked on claimant's nail gun, returning it to claimant after making appropriate repairs. He advised claimant to test the gun, which claimant did by shooting the gun into his own hand. Mr. Hare acknowledged that this was not horseplay, as he did not believe claimant shot the nail into his hand intentionally. After the incident, claimant advised Mr. Hare that the nail had fallen to the floor, but claimant also acknowledged that his hand hurt. Claimant did not discover until later that there was a nail embedded in his hand.

Respondent argues that claimant's history of the accident damages his credibility to the point where any information he would have provided to Dr. Prostic must be rejected. Therefore, respondent argues the opinion of Dr. Patel with regard to claimant's permanent

³ R.H. Trans. at 21.

impairment should be adopted, limiting claimant to no permanent impairment in this situation.

In workers compensation litigation, it is the claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.⁴

With regard to the nature and extent of injury, the Board finds Dr. Patel's opinion that claimant has no permanency is not persuasive. Having a nail, even a small finish nail, driven into one's hand, damaging the flexor tendon, has the potential to lead to permanent injury. Dr. Patel acknowledged he did no testing to determine whether claimant suffered carpal tunnel syndrome at the time of the last examination, performing only range of motion examinations on claimant's hand and, in particular, the middle finger and the joint connecting the middle finger to the hand.

On the other hand, Dr. Prostic's determination that claimant has a 15 percent impairment to the upper extremity relies to a significant part on the complaints of claimant, who describes hand pain and numbness to the elbow. However, claimant's testimony is less than credible, considering the history of accident provided by claimant and the substantially divergent complaints provided to Dr. Patel and Dr. Prostic. The Board considers claimant's testimony that he has pain, throbbing, numbness and weakness of grip, but experiences pain only every other day, to be suspect. Due to the divergence in injury history and physical complaints, the Board finds that the true measure of claimant's permanent impairment in this instance falls somewhere between Dr. Patel's zero percent impairment and Dr. Prostic's 15 percent impairment to the upper extremity. The Board, therefore, awards claimant a 7.5 percent impairment to the left upper extremity at the level of the forearm for the injuries suffered on February 10, 2003. The Award of the ALJ is modified accordingly.

K.S.A. 2002 Supp. 44-511, in defining additional compensation, includes any cash bonuses paid by the employer within one year prior to the date of the accident.⁵ In this instance, the wage statement⁶ lists the compensation provided to claimant for the 25 weeks prior to the accident, including a column marked "VAC/BON". The only testimony in the record identifying that particular column is claimant's testimony, which identifies it as time bonus. Respondent provides no contradictory evidence to that description. The Board finds that the entry to the wage statement⁷ shows bonus pay rather than vacation pay

⁴ K.S.A. 44-501 and K.S.A. 2002 Supp. 44-508(g).

⁵ K.S.A. 2002 Supp. 44-511(a)(2)(B).

⁶ R.H. Trans, Cl. Ex. 1 at 3.

⁷ *Id.*, Cl. Ex. 1 at 3.

and, therefore, the amounts listed therein are included in claimant's average weekly wage under K.S.A. 2002 Supp. 44-511. As the parties agreed at oral argument that the 25 weeks utilized by the ALJ was appropriate, the determination by the ALJ that claimant has an average weekly wage of \$324.42 for the injuries suffered on February 10, 2003, is affirmed.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Steven J. Howard dated November 30, 2004, should be, and is hereby, modified to award claimant a 7.5 percent permanent partial impairment on a functional basis to the left upper extremity at the level of the forearm and based upon an average weekly wage of \$324.42

Claimant is entitled to 4.29 weeks of temporary total disability compensation at the rate of \$216.29 per week in the amount of \$927.88, followed by 14.68 weeks of permanent partial disability compensation at the rate of \$216.29 per week totaling \$3,175.14 for a 7.5 percent permanent partial impairment on a functional basis to the left upper extremity at the level of the forearm, making a total award of \$4,103.02. As of the date of this award, the entire amount would be due and owing and ordered paid in one lump sum, minus any amounts previously paid.

IT IS SO ORDERED.

Dated this ____ day of May 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
John R. Emerson, Attorney for Respondent and its Insurance Carrier
Steven J. Howard, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director